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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY DEVELL HODGE,

Defendant and Appellant.

G041663

(Super. Ct. No. 07CF2061)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Stephanie Chow and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Gary Devell Hodge of two counts of second degree robbery and one count of second degree commercial burglary. Hodge admitted the truth of his prior strike and prior serious felony allegations. On appeal, he argues the trial court's failure to let the jury determine whether Paul Dalven was an accomplice lessened the prosecutor's burden of proof in violation of his Fifth, Sixth, and Fourteenth amendment rights to due process and a fair trial. We disagree and affirm the judgment.

### FACTS

Hodge worked as the general manager at the Papa John's Pizza store on East Chapman Avenue in the City of Orange. As general manager, Hodge was the immediate supervisor of store assistant managers Alma Flores, Patricia Lopez, and Dalven. After about nine months to a year, Hodge was transferred to the Papa John's store in Laguna Woods. Lopez was promoted to general manager at the Orange location. When Hodge was transferred to the Laguna Woods store, the combination to the safe at the Orange store was changed per company policy. Store managers and supervisors were the only employees with knowledge of the safe combination and were required to commit it to memory. Delivery drivers, including Justin Smith<sup>1</sup> and Jordan Soto, did not know the combination.

On Sunday, June 10, 2007, Dalven was scheduled to work between 5:00 p.m. and 11:00 p.m. but went to a barbeque instead. Before going to the barbeque, Dalven called Flores and asked if she would cover his shift. Flores agreed, and she worked the night shift as assistant manager. As part of her closing duties, she swept the floor and put the money in the store safe. Flores left the store shortly after midnight and locked the glass front door.

Lopez arrived at 9:00 a.m. the next morning to open the store for the morning shift. Lopez noticed a hole, large enough to put a hand through, in the middle of

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<sup>1</sup> Justin Smith and codefendant Forrest Smith will be referred to by their first names for the sake of clarity, and we intend no disrespect.

the store's glass door. The alarm had not gone off because it had been inoperative for at least seven or eight months. Water was running in the store's back sink and a cigarette butt was on the floor in the back work area. Nothing appeared to be taken and the safe was still locked. Lopez called her supervisor and informed him someone tried to break in. She also called Flores and asked if something had happened the night before. Flores met Lopez at the store to discuss the situation. After speaking with Flores, Lopez opened the safe and took out money for the register and money to be deposited at the bank. The morning driver usually took the deposit to the bank.

Around 10:00 a.m., Lopez received a call at the store from Justin, who asked for another driver named Brandon. Lopez told Justin no driver gets to the store before 11:00 a.m., which Lopez believed Justin should have known. Ten to 15 minutes after the phone call, Flores and Lopez were talking in the back of the store when a man came in wearing black pants and a black sweater with the hood on his head. The man yelled in a deep voice, "get on the floor" or "get on the ground" and "where's the money at?" Flores and Lopez immediately laid on the floor and only glanced at the man. While Flores was on the ground, the man took Lopez into the office to get the money from the safe. Lopez gave the man \$500 then got back on the floor. The man asked the women if they had cell phones. When the women responded "no," the man said he was "just going to look around." Less than a minute later, Lopez and Flores heard the front door close. After realizing the man had left, they called the police.

Lopez and Flores told one of the responding officers the man who robbed them was African American, in his early twenties, thin, tall, and was wearing a black hooded sweatshirt. When the officers showed Lopez pictures of possible suspects, Lopez identified Soto as the man who came in the store because he was tall, skinny, and had a familiar voice. After being shown a picture of Hodge, Lopez said he was not the man who came in the store.

An officer called Dalven about the robbery approximately one hour after it happened. The next day, a sergeant interviewed Dalven at the police station. Dalven explained Hodge was transferred to the store in Laguna Woods due to poor performance. Around the time Hodge was transferred, he had a conversation with Dalven about robbing the Orange store. Hodge recommended robbing the store on a Monday when the store has the most money. Dalven stated he did not know if Hodge was kidding and said he was not interested in robbing the store. A few weeks later, Hodge approached Dalven again about robbing the store, this time offering Dalven \$200 to participate in a robbery on June 10, 2007. Again, Dalven thought Hodge was joking and declined. Dalven told the officer he was afraid something would happen on June 10 so he called in sick to work. Dalven said he received a telephone call from Hodge the night of June 10 asking if the store was busy. Dalven told Hodge he was not at work because he called in sick. After Dalven talked to police, he called Hodge to find out if he had participated in the robbery.

One June 11, 2008, at 11:00 p.m., a black male identified as Forrest and a white male identified as Justin robbed the Papa John's store in Buena Park. They escaped in a white Camaro.<sup>2</sup>

The information charged Soto, Forrest, Justin, and Hodge with two counts of second degree robbery for taking property from the presence of Flores and Lopez by means of force and fear in violation of Penal Code section 211.<sup>3</sup> Soto, Forrest, Justin, and Hodge were also charged with one count of second degree commercial burglary in violation of sections 459 and 460, subdivision (b), for unlawfully entering Papa Johns, a

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<sup>2</sup> Counts 4 and 5 did not include Hodge. Therefore, the facts of that incident are limited to those which Hodge deems pertinent to counts 1 to 3.

<sup>3</sup> All further statutory references are to the Penal Code.

commercial building, with the intent to commit larceny. It was also alleged Hodge had suffered a prior strike conviction and a prior serious felony conviction.

At trial, the prosecution offered Flores's testimony. Flores testified she was hired by Hodge and they used to joke around at work together. According to Flores, Hodge had a quirky sense of humor. Flores recalled one time when Hodge jokingly jumped in the store and scared her and Lopez while they were working late. She said it was only funny when they realized it was Hodge and not a stranger. Flores testified she did not get a good look at the face of the man who broke into the store and she could only remember that he was wearing a sweater with a hood. Flores testified she did not know the race of the man but would say he was tall.

The prosecution also offered Crysanía Moreno's testimony. Moreno was Forrest's on-and-off girlfriend of about four years. She stated Hodge, Soto, Forrest, and Justin were roommates. She owned a white Camaro and testified she would allow Forrest to occasionally borrow it. She testified Forrest borrowed her car and probably went to get food on the morning of the burglary.

In addition, Richard Stoyanoff, a chiropractor with his office in the same parking lot as the Papa John's store, testified for the prosecution. Sometime after 9:00 a.m. on the morning of the incident, Stoyanoff opened his blinds and saw a young man wearing a black hooded sweatshirt run across the parking lot. Stoyanoff described the man as average height with thinner than medium build. Stoyanoff testified he saw a white, early 1990's model Camaro or Firebird with the passenger side door open and two people in the front seat.

Hodge offered his testimony at trial. He explained that after being with the Papa John's company for three months, he was transferred to the Orange store. He worked at the Orange store as an assistant manager and about one month later became general manager, making \$600 per week. Hodge explained that when he was transferred to the store in Laguna Woods, he was given a \$50 a week raise. He testified he lived in

an apartment with roommates Forrest and Soto. He explained Justin was not a roommate, but he was welcome to “crash on the couch” for a few nights. Hodge testified he was not friends with Justin, but they had a work relationship. Hodge explained Dalven and Justin were friends and the two used to go out together.

Hodge described an incident where \$600 was missing from the store. Hodge testified it was mandatory he blame Dalven because he was the only one working that night. Hodge explained he had an “abstract” sense of humor and joked with Dalven “a million” times about robbing the store. He testified he did not participate in or facilitate a robbery at the Orange store on June 11, 2007. He also denied knowing the alarm at the store did not work.

Hodge explained June 11, 2008, was his day off. That morning at about 8:00 a.m., Justin asked Hodge, who was still in bed, if he could borrow his cell phone. Justin did not have a cell phone and it was not uncommon for someone in the house to borrow Hodge’s. At some point, Hodge got out of bed, showered, and met with his friend Samantha Coulter. Hodge testified he got his phone back at some point before leaving as he recalled getting his phone from the charger. Hodge explained he certainly would not lose his job and have Dalven lose his job for \$200. Hodge testified the Papa John’s company treated him great and it was the best job he ever had. Hodge admitted that in 2005 he was convicted of a felony involving dishonesty.

Hodge offered Coulter’s testimony at trial. Coulter has been Hodge’s friend for four years. Coulter testified she called Hodge on the morning of the incident at about 7:30 a.m. to see if he wanted to “hang out” later that day when she got out of school. Coulter recalled Hodge sounded tired. Coulter explained she tried calling Hodge back on his cell phone at about 9:00 a.m. to tell him what time to pick her up, but Justin answered. Coulter testified Justin said he was not with Hodge, but had his cell phone. She explained that after not hearing from Hodge, she called him again at 11:00 a.m. and he answered. Shortly after, Hodge picked her up and they went to lunch, Blockbuster,

then back to his house. Coulter testified his demeanor was casual, the same as always. She explained Hodge is a very nice person but does have a crude sense of humor.

It was stipulated that Justin's DNA was found on the cigarette butt found in the Papa John's store. At the end of the prosecution's case-in-chief, Hodge moved to dismiss all three counts against him based on insufficiency of the evidence (§ 1118.1). The trial court denied the motion. At the conclusion of all defense evidence, Hodge renewed his motion to dismiss under section 1118.1. He argued there was insufficient evidence he was guilty of the charged crimes of robbery and burglary because Dalven had provided the only evidence connecting Hodge to those crimes, and it was possible Dalven was an accomplice whose testimony had to be corroborated. The trial court, after expressly considering the language of CALCRIM No. 334, found there was no evidence Dalven shared Hodge's intent to commit the charged crimes, nor any evidence Dalven performed any affirmative acts to aid in the commission of the crimes. The trial court found the evidence only showed Dalven rejected Hodge's request for him to participate in a robbery of the store and had stayed home on the day it was supposed to happen. The trial court, therefore, denied Hodge's motion to dismiss and did not instruct the jury with CALCRIM No. 334.

The jury found Hodge guilty of two counts of robbery and one count of commercial burglary. At a bifurcated proceeding, Hodge admitted the truth of his prior strike and prior robbery conviction. The trial court sentenced Hodge to a total of 11 years in state prison.

## DISCUSSION

Hodge contends the trial court erred by not instructing the jury with CALCRIM No. 334 and thereby did not allow the jury to determine whether Dalven was an accomplice. Hodge contends Dalven could have been an accomplice because Dalven was an assistant manager of the Orange store with knowledge of the safe combination, money was missing in the past from Papa John's on one of Dalven's shifts, and Dalven

was trying to implicate Hodge and deflect blame from himself when Dalven told police Hodge was transferred for poor performance. Hodge contends the trial court's failure to give the jury CALCRIM No. 334 lessened the prosecutor's burden of proof in violation of Hodge's right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments. We disagree. We find Dalven was not an accomplice, and therefore, the trial court properly refused to instruct the jury with CALCRIM No. 334.

A conviction cannot be based solely on the uncorroborated testimony of an accomplice. (§ 1111.) An accomplice is a person who is liable to prosecution for the identical offense charged against the defendant. (§ 1111; *People v. Boyer* (2006) 38 Cal.4th 412, 466-467.) Accomplices include persons who share the perpetrator's criminal intent *and* act as co-conspirators or aiders and abettors. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) Whether a person is an accomplice is a question of fact for the jury unless there is no dispute concerning the facts or the inferences drawn from them. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.)

If the evidence is sufficient to support a conclusion a witness implicating the defendant was an accomplice, the trial court must sua sponte instruct the jury to determine whether the witness was an accomplice and give the cautionary accomplice instructions. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 (*Tobias*).) Accomplice instructions inform the jury the accomplice's testimony and statements require corroboration by other evidence tending to connect the defendant with the commission of the offense. (CALCRIM No. 334.) The rationale is based on the notion that an accomplice's testimony may be untrustworthy because he or she may testify to curry favor, to obtain immunity, and may try to shift blame to the defendant in an effort to minimize his or her own culpability. (*Tobias, supra*, 25 Cal.4th at p. 331.) The burden is on the defendant to establish by a preponderance of the evidence that a witness is an accomplice. (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)



Hodge argues Dalven's criminal intent is evidenced by the fact money was missing on one of his shifts in the past. We disagree. The incident occurring on one of Dalven's shifts does not show a willingness to aid Hodge in stealing money from the Orange store. At worst, this fact shows Dalven had an intent to steal independent from crimes Hodge planned in this case or that he was negligent in keeping track of money previously. Hodge also argues Dalven could have been an accomplice because he was still an assistant manager who knew the combination to the safe and had independent knowledge about the best time to rob the store based on the amount of money available. However, if Dalven had actually shared Hodge's intent to rob the store on June 10th, he would have gone to work to use his knowledge of the safe's combination to open the safe during the robbery. Since Dalven testified he did not take Hodge's requests for assistance to steal from the store seriously, it is unreasonable to assume Dalven shared Hodge's criminal purpose to rob the store. Dalven testified he declined Hodge's offers to participate in the robbery, and Hodge in his testimony did not contradict that testimony.

Further, Hodge failed to provide necessary evidence of Dalven's affirmative act in aiding Hodge in committing the crime. Hodge did not testify Dalven was involved in the charged crimes. Hodge admitted when he called Dalven to see if he was working, Dalven said he had stayed home. However, even assuming Dalven knew of his friend's criminal purpose, as evidenced by Dalven staying away from work on Sunday, June 10, 2007, there was no evidence whatsoever Dalven intended to participate in the robbery.

Since Dalven lacked the criminal intent necessary to be considered an accomplice and he did not perform any affirmative acts to assist in committing the charged crimes, his testimony need not be corroborated. Thus, we conclude the trial court's refusal to instruct the jury with CALCRIM No. 334 did not violate Hodge's constitutional rights.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.